INSURANCE

# How employers can stub out tobacco surcharge litigation

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July 29, 2026 05:00 AM CDT

Employers are chewing on strategies to avoid costly lawsuits over their employee wellness programs.

Dozens of corporations including JPMorgan Chase and Walmart have been sued due to their health plans' execution of tobacco cessation programs. A former Comcast employee sued the cable and internet company this month, for instance.

Health plans can charge employees that use tobacco products up to 50% more in premiums in some states to encourage healthier behavior. But companies must offer a reasonable alternative workers can utilize to receive lower-cost insurance, and plaintiffs allege the programs fail to meet key criteria.

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Plaintiffs have filed more than 75 lawsuits against employers since 2024, with new cases filed nearly every week, said Kara Petteway Wheatley, who represents employers as a principal at Groom Law Group. There have been at least nine settlements, she said, along with judgements in both directions.

"When there's blood in the water, the sharks start circling," said Cory Jorbin, employee benefits compliance practice leader at the insurance brokerage Hub International.

Here's what employers should know about the wave of litigation.

## Why are there more of these lawsuits now?

Legal challenges to tobacco surcharges are on the rise.

The Labor Department sued Macy's, Cigna and the company now known as Elevance Health in 2017 over their handling of the retailer's tobacco surcharge program.

Since then, employers have faced a barrage of lawsuits as plaintiffs question how programs are applied, Petteway Wheatley said.

"It's becoming a more mainstream issue," said De'Andre Robbins, an associate at the law firm Warner Norcross + Judd.

## What do plaintiffs allege?

Employers face similar claims across many of the cases.

Under the Health Insurance Portability and Accountability Act of 1996's nondiscrimination rules, employers cannot charge more based on health status factors such as tobacco use, but businesses can set up wellness programs to meet HIPAA requirements and enforce higher premiums, said Stephanie Grant, a senior counsel at Warner Norcross + Judd.

Once employees complete a reasonable alternative, such as an online course, they are required to receive full reimbursement. Many workplaces remove the tobacco surcharge going forward, but lawsuits claim employers are also required to pay surcharges retroactively to the beginning of the plan year.

Employers are also dinged for allegedly not adequately disclosing the alternative program's availability to members.

Failing to develop a compliant wellness program violates fiduciary duty standards under the Employee Retirement Income Security Act of 1974, according to some plaintiffs.

"These rules are not well-understood out in the employer health plan community," said Wade Symons, partner at Mercer Health, a division of the benefits consulting company Mercer.

## Have employers won?

The lawsuits have been a mixed bag so far and many cases are still pending as even more arise.

Federal district courts dismissed allegations against PepsiCo and Ascension Health Alliance, the parent company of St. Louis-based Ascension, in February. Retailer Target was granted its motion to dismiss this month.

Courts have also sided with plaintiffs, including against grocery chain Whole Foods in January, when a court denied the Amazon unit's motion to dismiss.

Sporting goods retailer Bass Pro Group and food service distributor Performance Food Group separately settled lawsuits for nearly $5 million each last year.

## What are best practices for employers?

Until higher courts weigh in on the overarching issues, employers can take various measures to reduce legal exposure.

Companies should offer a retroactive refund until guidance is more clear in their jurisdiction, Robbins said. They can also consider switching to third-party administrators that are better equipped to handle retroactive refunds, he said.

It’s important businesses thoroughly communicate the details of their wellness programs in writing to workers, and ensure employees are not getting billed higher amounts than allowed under law, Jorbin said.

Surcharge programs’ limitations should also be considered, said Jeff Levin-Scherz, population health leader of the health management practice at WTW, a benefits consulting company. Completing a workplace wellness program does not force a member to quit using tobacco, he noted.